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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL R. SOUZA, Petitioner/Appellee, v. LISA MARIE SOUZA, Respondent/Appellant.	2 CA-CV 2009-0081 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO2007-00795

Honorable James L. Conlogue, Judge

AFFIRMED

Law Office of Michael E. Farro
By Michael E. Farro
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V Á S Q U E Z, Judge.

¶1 Lisa and Daniel are the unmarried parents of M., born in July 2006. Lisa and Daniel lived together from March or April 2005 through May 24, 2007. After they separated, Daniel filed a complaint in superior court to establish his paternity, child custody, and child support. In December 2007, the court ordered joint legal custody and awarded primary physical custody to Lisa, with Daniel receiving reasonable parenting time. In September 2008, Daniel filed a petition for modification, in which he sought sole legal and physical custody, with reasonable parenting time for Lisa conditioned upon her receiving counseling for anger issues. After an evidentiary hearing, the court modified its prior order and vested sole legal custody and primary physical custody with Daniel and awarded Lisa reasonable parenting time. This timely appeal followed.

Standard of Review

¶2 "We review the trial court's decision regarding child custody for an abuse of discretion." *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). In determining whether the court abused its discretion, we view the evidence and all reasonable inferences derived therefrom "in the light most favorable to sustaining [its] findings," *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998), and those "finding[s] will be upheld if there is any reasonable evidence to support [them]," *Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987).

Discussion

¶3 Lisa first asserts the trial court's order "failed to make specific findings on six factors under A.R.S. § 25-403." She contends that, because the court neglected to

discuss factors (A)(2), (5), (7), (8), (9), and (10) and "did not indicate how it weighed each finding that it did make," the order is insufficient as a matter of law. In support of this argument, Lisa relies on *Hart v. Hart*, 220 Ariz. 183, 204 P.3d 441 (App. 2009), in which the court vacated a custody order because it did not include the appropriate findings, as required by § 25-403(A).

¶4 Section 25-403(A) states that, when making a custody determination, a trial court must consider specific enumerated factors in accordance with the child's best interests. And subsection (B) provides that, "[i]n a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." Thus, in *Hart*, the court vacated the trial court's custody order because it did not refer to any of the enumerated statutory factors, despite the fact that evidence concerning many of those factors could be found in the record. 220 Ariz. 183, ¶¶ 10-14, 204 P.3d at 444-45. *See also Downs v. Scheffler*, 206 Ariz. 496, ¶ 19, 80 P.3d 775, 780 (App. 2003); *Owen*, 206 Ariz. 418, ¶ 12, 79 P.3d at 421-22.

¶5 Here, the trial court expressly considered every enumerated factor except the wishes of the child, factor (A)(2), and three other irrelevant factors. Contrary to Lisa's assertion, the court did consider factor (A)(5), the "mental and physical health of all individuals involved," by noting it was "concerned with the disrespect and anger exhibited by [Lisa]. It is apparent that the child is not shielded from [Lisa's] inappropriate behavior. As this Court noted on several occasions during the proceedings in 2007, M[.] will learn a great deal from observing his parent's actions." Thus, the court

expressed its concern about Lisa's anger issues in the context of their future effect on M.'s well-being. It also appropriately considered "[w]hether one parent, both parents or neither parent has provided primary care of the child," § 25-403(A)(7), by stating that "both parents have provided care for the child." Given the substantial parenting time Daniel had exercised, we reasonably can infer from the court's statement that it concluded both parents had provided primary care, as contemplated by the statute.

¶6 Furthermore, given M.'s age, two years old at the time of the trial court's ruling, we do not find the court erred in failing to consider his wishes. *See J.A.R. v. Superior Court*, 179 Ariz. 267, 274, 877 P.2d 1323, 1330 (App. 1994) ("The wishes of a child of a sufficient age to form an intelligent custody preference are persuasive . . . ."); *see also Banales v. Smith*, 200 Ariz. 419, ¶ 7, 26 P.3d 1190, 1191 (App. 2001) (error not reversible where trial court failed to make finding on one factor in custody order, when factor had been brought to its attention and express finding unlikely to have changed result).

¶7 Lisa is correct that the trial court did not explicitly state it had considered factors (A)(8), "the nature and extent of coercion or duress" in obtaining a custody agreement; (A)(9), compliance with a domestic relations education program, *see* A.R.S. § 25-352; or (A)(10), whether either parent had been convicted of making a false report of child abuse. However, neither the statute nor the case law requires the court to consider every enumerated factor. The court need only discuss those factors it finds

relevant under the facts of the case.[1] *See* § 25-403(B); *Hart*, 220 Ariz. 183, ¶ 9, 204 P.3d at 443-44. And Lisa does not contend there was any evidence relating to those factors. The court's order therefore complies with the requirements of § 25-403(B).

¶8 Lisa also contends insufficient evidence supported the trial court's order changing legal and primary physical custody of M. "'To change a previous custody order, the court must determine whether there has been a material change in circumstances affecting the welfare of the child.'" *Owen*, 206 Ariz. 418, ¶ 16, 79 P.3d at 671, *quoting Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994). Here, the court made numerous factual findings in support of its determination that it was in M.'s best interests for Daniel to have sole legal and primary physical custody. Lisa asserts some of the court's findings are unsupported by the record and contends a change in custody thus was not warranted.

¶9 Lisa first argues that, because on one occasion Daniel did not agree to a change in the parenting-time schedule, the trial court erred in concluding he was the parent most likely to allow M. frequent and meaningful contact with the other parent. However, there was evidence in the record that Daniel had not agreed to that particular change because he had already made plans for the child. There was also evidence that Lisa had interfered with Daniel's parenting time on multiple occasions by picking up M. from day care on Daniel's parenting days without informing him she had done so.

[1]Although § 25-352(A) requires the parties to complete an educational program in actions to determine custody and parenting time, in an action to modify a previous custody order, the trial court has discretion in deciding whether to order participation. Additionally, Lisa has not asserted Daniel failed to complete any such program previously ordered by the court.

¶10 Lisa also contends the trial court erred in finding Daniel was the parent most likely to follow the court's custody orders. She suggests he had violated the court's orders by not providing her the address and telephone number where M. would be staying when Daniel had taken him to Boston for a vacation, by making late child support payments, and by failing to notify the child support clearinghouse when he had changed jobs. The court's original custody order stated that a parent taking M. out of Arizona "shall notify the other parent of the location and a telephone number . . . where the child can be contacted by that parent." But the evidence demonstrated Daniel had complied with this order. He had notified Lisa by text message that he was taking M. to Boston, and he had carried his cellular telephone, for which Lisa had the telephone number, with him at all times. This was all the court's order required. However, Lisa is correct there was evidence that Daniel had made late child support payments on three occasions and had not informed the child support clearinghouse when he changed jobs. But the fact that Daniel did not comply with the court's order in those respects does not necessarily mean the court erred in concluding Daniel was more likely than Lisa to follow its orders.

¶11 The trial court's determination was further supported by evidence that Lisa had committed an act of domestic violence under A.R.S. § 25-403.03(D)(2) (person commits act of domestic violence for purposes of custody determination if that person places another in "reasonable apprehension of imminent serious physical injury to any person"). Daniel's wife, Jennifer, testified that she had obtained an order of protection against Lisa in May 2008 based on harassing telephone calls Lisa had made. While this order was in effect, Lisa came to the family residence while only Jennifer and M. were

present. When Jennifer answered the door, Lisa "shoved her foot in the door," apparently angry because Daniel had not provided her the address where M. would be staying in Boston, yelled at Jennifer, and "threaten[ed] to come in the house and whoop [Jennifer's] ass." When Jennifer informed Lisa that she was in violation of the order of protection, Lisa stated that "she had called the police that morning and told them she was going over to the house, and they had advised her not to." M., who was standing behind the door while this was occurring, became upset and started to cry. Jennifer took M. by the hand so that she could get the telephone and dial 9-1-1, and she told Lisa not to come in the house. Lisa entered the house anyway and said that, if Jennifer did not give M. to her, Lisa would kill her. Jennifer went into a bedroom and called the police.

¶12 Lisa was placed under arrest and charged with domestic violence/disorderly conduct and interfering with judicial proceedings. She later pled guilty to a misdemeanor charge of violating a court order. Evidence thus supported the trial court's findings that Lisa willfully had violated a court order by ignoring an order of protection and had committed the offense of disorderly conduct in the presence of M.

¶13 There was also evidence that Lisa had made "offensive and disparaging" remarks about Daniel in front of M., in violation of a previous admonition by the trial court. And, as noted above, on multiple occasions Lisa had picked M. up from his day care on Daniel's parenting days. Thus, contrary to her claim, there was substantial evidence in the record that she, too, had violated the court's orders.

¶14 Additionally, Daniel's wife testified that, on one occasion, Lisa "grabbed M[.] by the arm . . . and just kind of tossed him into the house." Daniel also testified that,

after M. had witnessed Lisa's disorderly conduct and spent three continuous weeks with her over the summer, M. began "lashing out at other kids[,] . . . throwing temper tantrums that lasted way longer than terrible-two tantrums," and "was close to violent . . . . [H]e would throw toys and stuff like that." However, he stated these behaviors eventually tapered off in frequency and severity.

¶15 In sum, the trial court specifically found Lisa's commission of disorderly conduct in M.'s presence constituted domestic violence pursuant to § 25-403.03, and it considered that "evidence as being contrary to the best interests of the child." It also voiced a particular concern about Lisa's willingness to follow court orders, given her "disrespect" in violating the protective order, and it noted these behaviors were "consistent with [Lisa's] demeanor and presentation at the inception of this case." Although there were disparities in the evidence and conflicting testimony about almost every issue the court considered in this case, weighing the evidence and determining each party's credibility was exclusively within the trial court's purview. We will not reweigh the evidence on appeal. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). There is reasonable evidence in the record to support the trial court's factual findings and ultimate conclusion that changing sole legal and primary physical custody of M. to Daniel was in M.'s best interests, and we therefore cannot say it abused its discretion in so finding. *See Mitchell*, 152 Ariz. at 323, 732 P.2d at 214.

Disposition

¶16 For the reasons stated above, we affirm. Daniel has requested attorney fees on appeal pursuant to A.R.S. § 25-324. In our discretion we deny his request. *See* § 25-

324(A). However, Daniel is entitled to costs incurred on appeal upon his compliance with Rule 21, Ariz. R. Civ. App. P.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge